No. 309.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

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The Louisville Trust Company, Trustee, Etc.,

vs.

Leonard Comingor.

Supplemental Brief for Louisville Trust Company, Trustee in Bankruptcy of Simonson, Whiteson & Co.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONSE TO BRIEF FOR COMINGOR.

AUGUSTUS E. WILLSON,
For Louisville Trust Company,
Trustee in bankruptcy of Simonson, Whiteson & Co.

C. H. DORESSEUR PRESS, LOUISVILLE

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THE LOUISVILLE TRUST COMPANY, TRUSTEE, ETC.

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RESPONSE TO BRIEF FOR COMINGOR.

In the brief for Comingor, p. 13, "Points of Law" 1, and pp. 14 and 15, "Argument," counsel for Comingor, without notice or motion to dismiss, insists that the judgment of the Circuit Court of Appeals should be affirmed or this appeal dismissed, claiming that the appellant or petitioner has not brought up the record as required by the rules.

Petitioner has brought up the entire record, and the only basis of this argument is the wording of one of the clerk's certificates. Rule 8, sub-divisions 1 and 3, requires the Clerk of the Circuit Court of Appeals to make return to the writ of error

by transmitting "a *true copy of the record* and of the assignment of errors *and all of the proceedings in the case* under his hand and the seal of the court," and that "no case will be heard until *a complete record*, containing in itself, and not by reference, all the papers, exhibits, depositions and other proceeds which are necessary to the hearing in this Court, shall be filed.

And counsel for Comingor insist that the certificate, on its face (R., page 71), shows that he has not done this.

We tender a supplemental brief, because this is the first notice of this point, which was not contemplated in the brief already filed for petitioner.

1. The record, page 70 (*91), has the certificate of the Clerk, as follows:

> "I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify *that the foregoing is a true and correct copy of the record in the case entitled in the matter of the petition of Leonard Comingor to review an order of the District Court of the United States for the District of Kentucky, No. 943, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.* In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 24th day of May, A. D. 1901."

This certifies that the record to which this certificate is appended is, in the language of Rule 8, sub. 1, a true copy of the record, and the certificate on page 71 relied on for Comingor shows that it is "a *true, full and complete copy of the proceedings* in said court in the cause and matter in the said

writ of certiorari stated." And therefore the certificates of the clerk clearly comply with the rule.

If the record has not all that should be in such a record, the fault is not with the trustee, petitioner here, but with Comingor, who made the record in the Circuit Court of Appeals by merely filing a petition and a number of extracts, self-selected, *ex parte*, for his own purposes from the records, not only of the bankruptcy court, but also parts of the record in a case in the State Court never part of the bankruptcy record and several original assertions as to facts not in either record.

The trustee objected to this record in the Circuit Court of Appeals as not complying with the rule. At page 41 is the motion made by the Trustee in Bankruptcy in the Circuit Court of Appeals "to dismiss the petition" (filed in that court for review), "because the petitioner, Leonard Comingor, has not filed herein a complete record containing in itself, and not by reference, all the papers, notices, depositions and other proceedings which are necessary to a hearing in this Court, and that no true copy of the record has been transmitted by the Clerk of the District Court of the United States under his hand and seal, as required by the rules of this Court."

At the foot of this motion is the Clerk's memorandum that it was filed February 12, 1901, and below that follows the notice, duly served on Comingor, that the motion would be made on that day, and this notice is filed on the same February 12th. There was no order of the Circuit Court of Appeals making the records on the two former appeals in the Simonson, Whiteson & Co. bankruptcy case a part of the record of the Court of Appeals in this proceeding, and the only reference to either of them was in the petition of Leonard Comingor for review, page 2, end of second paragraph: "All of the matters herein so far referred to appear

in records Nos. 716 and 777, in this Court, and are referred to as part hereof."

The notice, page 41, was that the Trustee would move the court, to dismiss Comingor's petition for review of the Bankruptcy Court decision ordering him to pay in the money and not to hear the case because a complete record had not been filed, and that in the event the court overruled the motion would move the court not to hear the case until such complete record should have been filed. Together with the motion to strike out, etc., which the record, at page 45, shows was filed February 12, 1901, pages 42–45, the Trustee objected to advancing the hearing and setting the case in that February term, or submitting the petition for review in the Circuit Court of Appeals and suspending the judgment in the District Court in bankruptcy, or to suspending proceedings against Comingor, and moved to dismiss the petition for review, and objected to the Circuit Court of Appeals proceeding therein, moved that court to refuse the petition of Comingor for review "because said petitioner has not filed, nor does he claim in said petition to file, a transcript of the whole record and proceedings in which he claims there was error . . . and because the court has no jurisdiction in the matter except appellate jurisdiction, and said petitioner has attempted to institute in this Court an original action, *selecting such parts of the record as he deems material and omitting all of the testimony taken in said proceeding.*"

Then followed motions to strike out certain parts of the petition for review in the Court of Appeals, which were original allegations not based on any record in the bankruptcy court or Court of Appeals, and this motion was supported by an answer and affidavit for the Trustee (p. 45) which traversed many allegations of the petition for review, which were not supported by any of the selected fragments of records in different courts, filed with that petition, and set up many matters

which were affirmative defense to the proceeding for relief, as set up by this petition for review, which was drawn in the form of an original petition, making original allegations that Comingor was dropped from further consideration in the case, etc., and not, strictly, an appellate proceeding.

At page 48 this answer alleged:

"That the opinion of the Referee accompanying the report, Exhibit No. 18, is material to the proper determination of this action and has been omitted."

At pages 51-2 we showed a large number of depositions taken in the court below, but not included in the record presented with this petition for review, and that it was necessary and material to the consideration and proper decision of the cause and of the petition of Comingor for review, for the court to know all of the acts and doings of Comingor in the said proceedings before the District Court and the Referee in bankruptcy, in order to show the fact . . . that said Leonard Comingor . . . never made any application to any other court than said District Court in bankruptcy for any allowance out of the funds which he held as assignee of Simonson, Whiteson & Co. for compensation for his own services or those of his attorneys, and never had any allowance by any court therefor, and never had any title or claim to hold any of said moneys of said bankrupt firm, collected and received by him in any capacity, except as assignee and trustee for the benefit of creditors of said firm, and can not claim here that he had converted or appropriated any of said funds collected, received or held by him as trustee, without asking the court to believe him guilty of unlawful, wrongful and unpermitted misappropriation and conversion of said trust funds in his hands to his own use in order to defeat the jurisdiction of the said District Court and Referee in bankruptcy; and that he can not plead or claim any adverse title or any personal

right of any kind to any of said funds, which he now claims to have retained for his compensation and the compensation of his counsel, without pleading his own wrong and breach of trust in order to exclude the jurisdiction of the said District Court and Referee in said bankruptcy proceeding, and that he never did make any such claim or any claim that he had any right to retain any part thereof, or that the State Court or any court had ever made him any order of allowance of any part thereof, nor did his said lawyers, M. A., D. A. & J. G. Sachs, make any such claim, but on the contrary his said lawyers expressly agreed before the Referee that if the Referee would not report them to the District Court for failure to comply with the rule for them to pay in the $3,000.00, that they would pay any order made against the assignee, Leonard Comingor (which they have heretofore failed to do), and that said assurance was given by said M. A., D. A. & J. G. Sachs through M. A. Sachs in the presence and with the permission of Leonard Comingor, petitioner herein . . . and that if a transcript of the record . . . and especially the depositions, were filed as part of the appellate proceedings of the petitioner in this Court, they would show the facts found by the Referee; that the said petitioner had not managed the said estate faithfully nor for the best interest of the creditors, but had colluded and combined with the bankrupts and certain favored creditors of the bankrupts to sell property of the bankrupt estate amounting to a great sum, to wit, $60,000.00, for the sum of $15,000.00 under an arrangement and agreement by which the favored creditors were to be paid fifty cents on the dollar, and the surplus of the proceeds of that operation, after paying such creditors fifty cents on the dollar, which was afterwards fixed at payment in full, should be divided between the bankrupts, and that, after said arrangement was carried out, a large sum was

divided among the bankrupts as profits of the wrecking of their business, and . . . was made possible by the unfaithfulness of said assignee to his duty as trustee," etc.

The answer specified the parts of depositions and certain parts of the record and proceedings before the District Court and Referee which were necessary to a correct understanding and determination of the issues (pages 53-4), and the Trustee prayed the court to require the petitioner, Comingor, to supply said omitted parts of the record, or to file herein a complete transcript of the record, of all of the pleadings, orders, proceedings and evidence in said District Court, and before said Referee in bankruptcy in the matter of said proceedings against Leonard Comingor, assignee. This answer was sworn to and filed February 12, 1901, in the Circuit Court of Appeals.

The order of the Circuit Court of Appeals (page 57) recites that the trustee filed a notice, the motion referred to therein and the motion to dismiss on grounds set up in the motion and to strike out parts of the petition (the original allegations, clearly improper in appellate proceedings for review), and also answer and affidavit of the trustee for a writ of certiorari for diminution of the record, and thereupon the Circuit Court of Appeals, on Comingor's motion, suspended the execution of the District Court order, and at pages 58-9 denied the motion to dismiss the petition and to add to the record, and finally reversed the judgment of the District Court.

ARGUMENT.

This was an *original* proceeding in the Circuit Court of Appeals, begun by "petition for review," and there was no record in that court in this proceeding, except the proceedings begun and had there, all of which are here complete. The Clerk of the Circuit Court of Appeals, in his return to the writ of certiorari, could not certify more than he did. There was no record in the Circuit Court of Appeals in this proceeding, except the proceedings begun and had there. His certificate in the return recites that "a true, full and complete copy of the proceedings in said court in the cause and matter in said writ of certiorari stated" is returned pursuant to the command of the writ. What more could be returned in that case? "Record" would be only a synonym for the "proceedings" in this Court, and we submit that they can not ask the court to say, on the return to a writ of certiorari, in an original proceeding in the Circuit Court of Appeals, where there is no other record than the proceeding in said court, that said certificate is insufficient, especially when they do not point out a single paper material to the case that is omitted from the record; but if the court should be of the opinion that there should be further return, we hope the court will order a new return if the one already made is not sufficient, for this is not a writ of error or appeal which expires by limitation, and Comingor has not moved the court to dismiss for failure to show proper return to the writ.

The court has frequently rebuked the including immaterial papers in the record, and in Ball & Socket Fastener Co. vs. Kraetzer, 150 U. S. 118, taxed costs for incorporating such papers, as they did in R. R. Co. vs. Stewart, 95 U. S.

284. If any paper is omitted from the record, it should be brought to the attention of the court by an application for a writ of certiorari for diminution to bring that paper up. Such writ would be denied for any immaterial paper. Union Pacific vs. W. S., 116 U. S. 402.

Certificates have been permitted to be amended, Idaho & Oregon Imp. Co. vs. Bradbury, 132 U. S. 509, and the court, as we understand the rule in Schulte vs. R. R. Co., 100 U. S. 644, will not dismiss the case, especially when there is no motion for diminution nor to dismiss, on a mere suggestion in appellee's brief, without notice or previous application, without permitting the petitioner to bring up any material papers that are omitted.

The other records in other former appeals, referred to in the petition for review, were not read in this case, and are not proper parts of the record in this case. We took all of the record there was in the Circuit Court of Appeals to this Court on the writ of certiorari, and the first appeals in the bankruptcy case had nothing to do with the questions raised on Comingor's petition for review. They are different cases. The writ of certiorari to remove this case took up only the proceedings in this case in the Circuit Court of Appeals. For aught this Court knows, there might be fifty other petitions, appeals or writs of error, and if reference to them in a petition for review could make any number of such records part of the records in a case, without any order of the Circuit Court of Appeals reading such records in the case, or making them part of the record in this case, then it would be entirely practicable to defeat any such application for review of such decision in the Circuit Court of Appeals by referring to such a number of records, say, all the records in the Circuit Court of Appeals; that it would be impracticable to get them printed.

We submit that the jurisdiction of the Circuit Court of Appeals on the petition for review should have been an appellate proceeding, based only on the record in the one case sought to be reviewed, and should have presented all the record of the lower court that was necessary to a proper determination of the question then before the court; but the Circuit Court of Appeals failed to strike out the new original allegations not based on the record and refused to require the rest of the record to be brought up, and decided the case purely on the one legal proposition, that this proceeding to require a State court assignee to pay the funds in his hands into the Bankruptcy Court, after adjudication in bankruptcy, must be by a plenary suit, and could not be by a summary proceeding by rule and attachment, and, assuming that proposition to be true, the court regarded the merits as not involved, and that it was immaterial whether the assignee had acted in bad faith or not, or whether he deserved anything or not, or that the assignee, who held the money solely as trustee, who had never applied to any court for its allowance to him as compensation for himself or his attorneys, who had never had any order allowing it, but held it solely as assignee and officer of the court, could set up and maintain an adverse claim to that money, nor what else was or was not in the record.

The trustee in bankruptcy urged that Comingor was simply an officer of court; that he had applied to the referee and the District Court to allow him the amount in controversy; that he had never applied to any other court, and that he could not set up an adverse claim to the court funds without relying upon his own wrong, and that there was no need of a plenary suit, as there would be against a third party claiming the money in his own right and not an officer of the court, and that the Bankruptcy Court was the only court

that could consider the matter of an allowance to him; that the State Court could not longer do so, because all jurisdiction over the fund ended with the adjudication in bankruptcy, leaving it, as the necessary result, for the Bankruptcy Court to pass on any allowance to the assignee for expenses and services as assignee in the State Court.

We submit, then, that our motion in the Circuit Court of Appeals to dismiss the appeal for failure to bring up the complete record should have been sustained, and we submit to the court our request for such declaration here.

Counsel for Comingor insist that the Referee had no jurisdiction to appoint a receiver except upon application of the parties. We submit that the court can not tell whether the Receiver was not appointed upon application of the parties. The complete record is not here, nor was it in the Circuit Court of Appeals, so that the court can not tell here, in the absence of the rest of the record, whether the missing parts did not contain such an application, and as the whole record is not before the court, we ask the court, as a matter of law, to assume that the Referee first and then the District Court acted lawfully and within the jurisdiction conferred by law.

Upon the proposition that the Referee did not have the right to appoint a Receiver, we submit that Section 38 (4) of the Bankruptcy Act, which authorized the Referee to "perform such part of the duties, except as to . . . compositions or discharge, as are by this act conferred in Courts of Bankruptcy, etc.," authorized the Referee to perform all of the duties of the Judge, with certain exceptions, of which the appointment of a Receiver is not one, and that either the court or Referee did have jurisdiction to appoint a Receiver. The Receiver was appointed temporarily before there was time under the law to appoint the Trustee. This

jurisdiction to appoint a Receiver existed with or without the application of the parties, so that even if no application had been made, the jurisdiction to appoint existed, whether the parties applied for it or not, and if the appointment was within the jurisdiction Comingor was bound to obey the order.

But the point is made that the Referee had no power to appoint a Receiver except "upon application of parties in interest," citing Section 2 (3) of the Act. If this were the only provision upon the subject of the jurisdiction of the court, the point might be well taken, but Section 2 (7) gives the court power "to cause estates of bankrupts to be collected," etc., and the closing paragraph of Section 2 is in these words: "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." It has been repeatedly held that a bankruptcy proceeding is in the nature of an equity proceeding, and not an action at law. In re Wallace, 2d National Bankruptcy Reports, 52; Federal Cases 17094. Surely the appointment of a receiver is an equity proceeding and not one at law, and Section 2 gives the bankruptcy court jurisdiction in equity as well as at law. The right to appoint a receiver exists in a Court of Equity upon motion of parties or *sua sponte*, and as all such rights are, by the quotation last made, expressly reserved to the bankruptcy court, it seems to us that this inherent right in equity to appoint a receiver is not taken from the court, but is expressly preserved to it. Hence we submit that under the clause authorizing the Court or Referee to cause estates of bankrupts to be collected, coupled with the clause that nothing in Section 2 shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not enumerated, it is clear that in the exercise of the ordinary

equity powers a receiver may be appointed with or without application of the parties.

The statement on page 24 of the brief that Comingor had appropriated the money to his own use and to that of his counsel may be literally true, but the law does not suffer him to assert it in a pleading as a matter of defense to the court's rule for him to pay in the moneys held for the court. He was holding it for the State Court and its successor by operation of the law, the Bankruptcy Court, as assignee, and as the Circuit Court of Appeals said, *re* Francis Valentine Co., and as this Court has declared in like cases, his possession as assignee was not in opposition to the right of the bankrupts nor in antagonism to the title of the bankrupt, or of the bankrupt estate or the trustee in bankruptcy, but depended wholly and was based entirely upon the assumption that the title was in the bankrupts, and legally in custody of the court, not the assignee, and therefore he could not be heard to say that his holding under the court was adverse to the court. Besides, his response set up no adverse holding, and the bare allegation of the conclusion of law that he holds it adversely does not change the real legal status, as the facts in the case show that he was not holding it adversely, but that he obtained possession of these moneys and collected them as assignee under the State law and the State Court, for the benefit of the bankrupt estate and its creditors, and that was not antagonistic to the bankrupts' claim or the claim of its creditors through the trustee in bankruptcy. The assignee as an officer of the courts can not question the title or power of the courts over the funds, which he holds under that power alone, and when the court decides to order the money held for it to be paid in, the law does not permit him to plead in the court for which he is

acting, the only court which has the control, the court to which the State Court's control passed by operation of law, upon the adjudication in bankruptcy, that he has converted or used the court money for his private purposes. The State Court would not permit such defense if it still had control, and the bankruptcy court has all of the power which the State Court had before it, and the assignee must answer to the bankruptcy court just as he would have had to answer to the State Court.

Respectfully submitted.

AUGUSTUS E. WILLSON,

For Louisville Trust Company,
Trustee in bankruptcy of Simonson, Whiteson & Co.